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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Petitioners,

—v.—

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

In its broadest sense, this case involves several issues of deep concern to the ACLU. A wave of violence and unlawful activity directed at abortion providers around the country has seriously impaired the ability of women to exercise their constitutional right to reproductive choice. That right is one that the ACLU has supported for decades, in the courts and elsewhere. The ACLU has participated in nearly every abortion case decided by this Court since *Roe v. Wade*, 410 U.S. 113 (1973), and lawyers associated with the ACLU have been counsel of record in many of this Court's landmark abortion decisions, from *Doe v. Bolton*, 410 U.S. 179 (1973), to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. __, 112 S.Ct. 2791 (1992). In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. __, 113 S.Ct. 753 (1993), the ACLU urged the Court to adopt an interpretation of 42 U.S.C. §1985 that would protect the right to reproductive choice against private conspiracies. Following the rejection of that argument in *Bray* and the subsequent assassination of Dr. David Gunn in Pensacola, Florida, the ACLU has supported efforts in Congress to enact a new civil rights law designed to curb the epidemic of clinic violence.

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[1] A letter of consent to the filing of all *amicus* briefs has been lodged with the Clerk of the Court by counsel for all parties in compliance with Rule 37.3.

In contrast to *Bray*, the present case has not been brought under a traditional civil rights statute but under RICO, 18 U.S.C. §1961, *et seq*. The reliance on RICO raises separate concerns for the ACLU, which opposed the enactment of RICO in 1970 and has opposed its overzealous enforcement ever since. Many of the ACLU's objections have focused on such due process issues as RICO's broad reach, its loose evidentiary standards, and its draconian forfeiture provisions. But the ACLU has also recognized that the problematic features of RICO carry a special sting in a First Amendment context. For example, in *Alexander v. United States*, __ U.S. __, 61 U.S.L.W. 4796 (June 28, 1993), the ACLU took the position that the use of RICO to seize and destroy the entire contents of a bookstore was irreconcilable with the First Amendment, a view shared in that case by the four dissenting justices. *Id*. at 4800.

Since its founding in 1920, moreover, the ACLU has steadfastly endorsed the position that the "[e]ffective advocacy of both public and private views, particularly controversial ones, is undeniably enhanced by group association," *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), and that the associational rights protected by the First Amendment include the right to demonstrate, boycott, leaflet and picket. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88 (1940). Because of the ACLU's commitment to the First Amendment, it has frequently defended the associational rights of political groups whose ideological views it has vigorously opposed.

In opposing *certiorari*, defendants have argued in this case that the economic motive test embraced by the Seventh Circuit is an appropriate means of ensuring that RICO is not used to abridge their First Amendment rights. In our view, the civil liberties interests at stake are far more complex. The ACLU has never endorsed the view, and this Court has never held, that there is a civil liberties interest in shielding political associations

from liability for their illegal acts. Thus, if plaintiffs are able to prove that defendants engaged in a pattern of illegal behavior designed to interfere with the exercise of plaintiffs' constitutional rights, the fact that defendants were motivated by politics rather than money is no more relevant than it would be if a group of white supremacists claimed a First Amendment right to intimidate blacks seeking to vote. As a matter of constitutional law, the presence or absence of an economic motive is not what distinguishes protected political expression from unlawful acts of violence or terrorism.

Accordingly, the economic motive test seems to us a poor proxy for the civil liberties issues that can and do arise under RICO. The ACLU takes no position, therefore, on whether the Seventh Circuit's interpretation of RICO was correct in this case. However, if the Court remands this case for trial, either by rejecting the economic motive test or by finding that the Seventh Circuit misconstrued the economic motive requirement, *see* n.5, *infra*, we respectfully submit that the Court's decision should include a set of constitutional guidelines designed to mitigate the civil liberties risks that are inherent in virtually every RICO litigation and that are inevitably magnified when RICO is applied in such a politically charged atmosphere. This *amicus* brief is intended to assist the Court in that effort.

SUMMARY OF ARGUMENT

The complaint in this case was filed as a nationwide class action on behalf of women's health centers that provide abortions and the women who seek abortions at those centers.[2] Of central importance at this stage of the

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[2] The class certification motion was still pending when defendants' motion to dismiss was granted. *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612, 615 n.3 (7th Cir. 1992).

proceedings, the complaint charges (on behalf of the clinics) that several individuals and groups who are prominently identified with the anti-choice movement violated RICO by operating the Pro-Life Action Network, an umbrella anti-choice organization, through a pattern of racketeering activity.[3]

The complaint sets forth a long list of illegal and/or harassing activities allegedly committed in furtherance of defendants' goal of closing down abortion clinics around the country. Those activities include:

> extortion; physical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; telephone campaigns designed to tie up center phone lines; false appointments to prevent legitimate patients from making them; and direct interference with centers' business relationships with landlords, patients, personnel, and medical laboratories.

National Organization for Women, Inc. v. Scheidler, 968 F.2d 612, 615 (7th Cir. 1992).

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[3] For purposes of this appeal, the relevant sections of RICO are 18 U.S.C. §§1962(c) and (d). Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1962(d) penalizes conspiracies to violate any of RICO's substantive provisions, including §1962(c).

The complaint also refers at several points to meetings and demonstrations organized by the defendants, and to the distribution of a manual written by defendant Scheidler that the Seventh Circuit described as "advocat[ing] unlawful methods of interfering with the operations of women's health centers." *Id.* at 615. Defendants point to these allegations as evidence that plaintiffs are seeking to impose RICO liability based on protected First Amendment activity. *See, e.g.*, Scheidler Op.Cert. at 24-25.

The Seventh Circuit, apparently, did not see the complaint as presenting the same threat to First Amendment interests that defendants perceive. In the Seventh Circuit's view,

> the complaint does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

Id. at 616.[4]

In the absence of a trial record, such differing interpretations are not surprising. What is more significant at this pleading stage is the shared understanding by all parties and the court of appeals that, in the event of any trial on remand, the line separating "peaceful protest"

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[4] The RICO case statement submitted by plaintiffs in the trial court alleges numerous instances of the sort of tortious and criminal activity listed in the Seventh Circuit's opinion.

from "criminal and tortious activities" must be carefully maintained. The first is constitutionally protected, the second is properly subject to sanction. Moreover, if sanctions are imposed, it is essential to distinguish between those who are responsible for the unlawful activities and those who are not, especially in a context where lawful and unlawful activities often take place side-by-side.

Fortunately, the Court has dealt with these problems before in other contexts and the rules are reasonably well-settled. The application of those rules to RICO, however, is less well-settled and deserves emphasis.

First, the Constitution does not protect extortion or "true" threats of violence directed at specific individuals. *Watts v. United States*, 394 U.S. 705 (1969)(*per curiam*). It does protect hyperbolic rhetoric and "threats" of social ostracism or even damnation.

Second, when the alleged RICO enterprise is an ideological association, individual defendants may not be held liable unless they played a significant role in the "operation and management" of the enterprise, *see Reves v. Ernst & Young*, 507 U.S. __, 113 S.Ct. 1163 (1993), and had a specific intent to further the association's illegal aims. *E.g., Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961).

Third, neither an ideological association nor its leaders can be held derivatively liable for the unlawful activities of its members, under RICO or otherwise, except upon a finding that the association and/or its leaders "authorized or ratified the misconduct in question." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982)(citations omitted). Furthermore, a defendant's speech or expressive activity can form the basis for direct liability only if the speech is part of a conspiracy or is intended and likely to produce imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(*per curiam*).

We recognize that the propriety of these standards may never be reached if the decision below is affirmed. We have nevertheless chosen to submit this *amicus* brief because we believe that the clear articulation of these standards will ultimately serve the constitutional interests of all sides in this controversy if this case is remanded for trial.[5]

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[5] If this Court affirms the holding below that an economic motive is required under RICO, the existence of such an economic motive cannot be found in the solicitation of voluntary contributions in support of the defendants' protected associational activities. *See* 968 F.2d at 630. The charitable solicitation of funds is a form of speech protected by the First Amendment. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). As this Court has noted, it implicates several distinct speech interests, including: the interest of the organization in soliciting support; the contributor's expression of support for the recipient organization and its views; and the ability of the organization to communicate its ideas to a larger audience. *See Cornelius*, 473 U.S. at 797-99. RICO liability cannot be based on protected First Amendment activity. *See* pp.10-16, *infra*. Consequently, the solicitation of charitable contributions cannot be used as proof of an alleged economic motive under RICO unless the charitable contributions were obtained through illegal coercion or fraud.

We do not take any position in this brief on whether the economic motive test could be met by proof that defendants' activities "were aimed at increasing the plaintiffs' costs of doing business." *Scheidler*, 968 F.2d at 630. Likewise, we express no view on whether it is sufficient to show that defendants committed economic crimes to bankroll their political activities. *See, e.g., United States v. Bagaric*, 706 F.2d 42, 55-57 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983). These issues will need to be resolved if the Court finds that an economic motive test is appropriate.

ARGUMENT

ANY FUTURE PROCEEDINGS IN THIS CASE SHOULD BE TAILORED TO PROTECT THE CONSTITUTIONAL RIGHTS OF ALL PARTIES

If this case is remanded for trial, the trial court will be facing a sensitive task. On the one hand, defendants may not claim any constitutional immunity for unlawful activities designed to interfere with the exercise of plaintiffs' constitutionally protected rights. On the other hand, plaintiffs may not rely on RICO to thwart defendants' lawful political protests even if those protests have the effect of discouraging some women from obtaining lawful abortions. Similarly, defendants may not escape liability for unlawful activities that they authorized, ratified or incited, even if the unlawful activities were actually performed by others. Conversely, any finding of liability must rest on something more than a theory of guilt by association, especially in a context where lawful and unlawful activities are often mixed together.

Although this delicate balance is not unique to RICO, the risk of miscalculation is increased by the amorphous nature of RICO itself. Moreover, the cost of misapprehending the appropriate constitutional lines is magnified under RICO by the availability of treble damages. If the use of RICO is to become commonplace in cases of this sort, RICO lawsuits must proceed with an understanding that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 908. As this Court clearly stated in *Claiborne Hardware*:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the

> context of constitutionally protected activity, however, "precision of regulation" is demanded. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

Id. at 916-17 (footnote and citation omitted).

This statement of principle arose out of a dispute between white merchants in Claiborne County, Mississippi and the local branch of the NAACP, which had organized a seven-year boycott against local businesses that were resisting racial integration. Relying on the fact that some boycott supporters had resorted to violence, the Mississippi courts declared the entire boycott illegal, and awarded crippling damages against the NAACP. This Court unanimously reversed in an opinion that carefully distinguished protected political activity from actionable conduct.

As a threshold matter, the Court ruled that the plaintiffs could only recover for losses proximately caused by unlawful activity; business losses attributable to lawful, nonviolent boycott activity were not compensable. *Id.* at 918. The Court next ruled that individual NAACP members could not be held liable based upon their mere participation in the boycott:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

Id. at 920. Finally, the Court ruled that the NAACP

could not be held liable for acts of violence committed by boycott participants unless the organization had authorized or ratified their actions. *Id.* at 930-31. "To impose liability without a finding that the NAACP authorized -- either actually or apparently -- or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment." *Id.* at 931.

Each of these principles has relevance here and is likely to be relevant in most other cases where RICO is used against organizations that are accused of seeking to further their ideological goals through unlawful as well as lawful means. Most fundamentally, lower courts confronting RICO claims against ideological associations must carefully distinguish between unlawful conduct, which may give rise to civil liability, and protected conduct, which may not. Here, the shared understanding that this line must be drawn, *see* pp.5-6, *supra*, lessens but does not eliminate the risk of constitutional overreaching.

For example, the complaint in this case includes allegations that the defendants engaged in acts of "physical and verbal intimidation and threats directed at health center personnel and patients." 968 F.2d at 615. An allegation of this sort may or may not present constitutional problems depending on what it actually means and how it is proven. The Constitution does not protect "true" threats of violence directed at specific individuals. *See Watts v. United States*, 394 U.S. at 708. "Threats" of ostracism, vilification or eternal damnation, by contrast, are constitutionally protected speech.

> The claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment . . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's . . . practices. Those

> practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But, so long as the means are peaceful, the communication need not meet standards of acceptability.

Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); *see also Claiborne Hardware*, 458 U.S. at 921 ("To the extent that the court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment").

This distinction is as critical under RICO as it was in *Claiborne Hardware*. The central claim in the present complaint is that defendants have violated 18 U.S.C. §1962(c) by operating a RICO enterprise (the Pro-Life Action Network) through a pattern of racketeering activity that includes multiple predicate acts of extortion, which are described at great length in the RICO case statement. *See* n.4, *supra*. In evaluating that claim, it is essential that the lower courts not confuse protected political activities with criminal extortion or use evidence of protected political protest to establish a pattern of racketeering activity.

At the same time, it is equally important for the lower courts to resist the claim that the First Amendment is a shield for criminal behavior. The First Amendment requires a distinction between political protest and criminal extortion. It does not immunize criminal extortion because it is engaged in as a form of political protest.

In similar fashion, the First Amendment compels caution before imposing RICO liability on individual defendants allied with ideological organizations that have both legitimate and illegitimate aims. The Court has long recognized that the imposition of liability under these circumstances poses special constitutional risks:

> There is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

Noto v. United States, 367 U.S. at 299-300; *see also Scales v. United States*, 367 U.S. at 229-30 (a "blanket prohibition of association with a group having both legal and illegal aims" would create "a real danger that legitimate political expression or association would be impaired"). For this reason, membership in such an organization may not be punished unless an individual joined the organization with knowledge of, and a specific intent to further, its illegal aims. *Claiborne Hardware*, 458 U.S. at 920; *Healy v. James*, 408 U.S. 169, 186 (1972). This constitutional requirement is separate from, and in addition to, RICO's statutory requirement that the defendant participate in the operation and management of the RICO enterprise. *See Reves v. Ernst & Young*, 113 S.Ct. 1163.[6]

Because RICO liability does not turn on mere membership (unlike the Smith Act prosecutions at issue in *Scales* and *Noto*), these constitutional concerns will not normally come into play. There are, nonetheless, cases in which a defendant's participation in an association's activities will be proffered as circumstantial evidence of a RICO violation. It is precisely this circum-

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[6] Thus, one could be a director of an ideological association and committed to its political goals, and yet be personally opposed to furthering those goals through unlawful means. Alternatively, a supporter of the same organization might have the intent to engage in the illegal actions, yet not be involved in the association's operation and management. In neither case could the defendant be held liable under RICO.

stantial inference that is not constitutionally permissible with an ideological association unless there is evidence of a defendant's specific intent to further the illegal aims of the association. Under RICO, that burden will frequently be met by evidence that the defendant is culpable for two or more predicate acts of racketeering activity, a required element in most RICO offenses.[7]

Any effort to hold a RICO defendant vicariously liable for someone else's unlawful behavior in cases of this sort must also be judged against First Amendment standards.[8] *Claiborne Hardware* again establishes the guide-

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[7] This will not always be true in RICO claims brought under § 1962(d), the conspiracy provision. There is a split in the circuits as to whether a defendant charged in a RICO conspiracy must personally agree to commit two predicate acts of racketeering activity or whether it is sufficient that he agree that two predicate acts be committed. *See, e.g., Pryba v. United States*, 498 U.S. 924 (1990)(White, J., dissenting from denial of *cert.*). The majority of circuits have adopted the latter position. *See United States v. Pryba*, 900 F.2d 748, 760 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990)(collecting cases). In these circuits, in particular, there is a danger that a court might attempt to infer a defendant's agreement from his participation in the operation of the ideological association and the commission by his "co-conspirators" of acts of racketeering. The First Amendment forbids this inference without some direct evidence of the defendant's specific intent to further the organization's illegal aims. *Claiborne Hardware*, 458 U.S. at 918-19; *see also DeJonge v. Oregon*, 299 U.S. 353, 365 (1937):

> If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

[8] Lower courts have consistently held that a civil RICO defendant may be held vicariously liable for predicate acts of racketeering as an aider and abetter. *See, e.g., Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1356-60 (3d Cir. 1987).

lines. In that case, the plaintiffs sought to hold Charles Evers, the NAACP's Field Secretary in Mississippi, liable on the basis of several speeches he had given in which he called for violence against boycott breakers. The Court ruled that these speeches alone could not provide a basis for liability:

> There are three separate theories that might justify holding Evers liable for the unlawful conduct of others. First, a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.

458 U.S. at 927. Because there was no other evidence that Evers had authorized, ratified, or directly threatened unlawful conduct, nor any evidence that his remarks had precipitated violence by others, the judgment against him could not be sustained. *Id.* at 927-29.

The same rules should apply to the present case. The individual defendants cannot be held liable based upon speeches advocating or endorsing unlawful action unless defendants' words (1) authorized, ratified or directed the illegal actions, or (2) constituted illegal incitement under the test set forth in *Brandenburg v. Ohio*, 395 U.S. at 447:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such

> advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Likewise, the defendants cannot be held liable for failing to disavow violent or criminal acts, because "[a] legal duty to 'repudiate' -- to disassociate oneself from the acts of another -- cannot arise unless, absent the repudiation, an individual could be found liable for those acts." *Claiborne Hardware*, 458 U.S. at 925 n.69.

Claiborne Hardware also establishes the rules of liability for the organizational defendants in this case -- Operation Rescue, the Pro-Life Action League, the Pro-Life Direct Action League, and Project Life. They may be held responsible for the acts of their agents undertaken within the scope of their actual or apparent authority. *Id.* at 930, citing *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). They may also be held liable for other action of which they had knowledge and specifically ratified. 458 U.S. at 930. However, they may not be held liable for the actions of their supporters undertaken without their authorization or ratification. As this Court concluded in *Claiborne Hardware*:

> To impose liability without a finding [of actual or apparent authorization or ratification] would impermissibly burden the rights of political association that are protected by the First Amendment . . . . "The rights of political association are fragile enough without adding the threat of destruction by lawsuit."

Id. at 931-32, quoting *NAACP v. Overstreet*, 384 U.S. 118, 122 (1966)(Douglas, J., dissenting from dismissal of *cert.*).

Application of the foregoing principles to civil RICO actions brought against ideological associations will re-

quire the lower courts to draw some fine distinctions between protected and impermissible conduct. But such careful line drawing is critical if our courts are to be respectful of the constitutional rights of all of the parties to the underlying dispute: the rights of women to obtain safe and legal abortions free from the threat of violence and the rights of anti-choice protesters to attempt peacefully to dissuade them from this course.

This Court concluded its opinion in *Claiborne Hardware* with a command to lower courts to be attentive to such distinctions:

> The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott . . . [It] must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.

458 U.S. at 933-34.

CONCLUSION

The epidemic of violence against abortion clinics throughout the country demands a strong remedial response. The use of civil RICO as that remedy, however, poses its own problems. Accordingly, if a remand is ordered, we respectfully urge the Court to use this case as an opportunity to establish a clear set of constitutional guidelines for the lower courts, modeled in large measure upon the decision in *Claiborne Hardware*. In our view, such guidelines will go a long way toward protecting both the right to reproductive choice and the right to peaceful political protest.

Respectfully submitted,

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